LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUL 17 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1483

UNITED STATES STEEL CORPORATION,

Petitioner,

v.

JIMMIE L. RODGERS and JOHN A. TURNER,

BRIEF IN OPPOSITION TO CERTIORARI

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
BARRY L. GOLDSTEIN
DEBORAH M. GREENBERG
ERIC SCHNAPPER
BILL LANN LEE
10 Columbus Circle
New York, N. Y. 10019

BERNARD D. MARCUS
Kaufman & Harris
415 Oliver Building
Pittsburgh, Pa. 15222

Attorneys for Respondents

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	1
Statutes and Rules Involved	2
Statement	3
Argument	12
1. The local civil rule and orders of the district court were in conflict with Rule 23 of the Federal Rules of Civil Procedure	12
2. The district court's rulings conflicted with Title VII of the Civil Rights Act of 1964	15
3. Local Civil Rule 34(d) violates the First Amendment	15
4. The trial court's rules and orders interfered with free access to counsel	17
5. The restraint on communications was censorial and discriminatory	19
6. The court of appeals carefully delimited its ruling to avoid broad issues involving other types of regulations which might be imposed in other cases or by other rules of court	20
Conclusion	22

Table of Authorities

Cases: PAGE

Albemarle Paper Co. v. Moody, —— U.S. —— (decided June 25, 1975) 15

Bantam Books v. Sullivan, 372 U.S. 58 (1963) 17
Bates v. Little Rock, 361 U.S. 516 (1960) 18
Bridges v. California, 314 U.S. 252 (1941) 16
Brotherhood of Railroad Trainmen v. Virginia ex rel. State Bar, 377 U.S. 1 (1964) 16, 18

Carroll v. Princess Ann County, 393 U.S. 175 (1968) 17
Chandler v. Fretag, 348 U.S. 3 (1954) 18
Craig v. Harney, 331 U.S. 252 (1941) 16

Dickerson v. United States Steel Co., 64 F.R.D. 351 (E.D. Pa. 1974), appeal quashed, 9 E.P.D. 10063 (3rd Cir. 1975) cert. denied —— U.S. ——, 44 L.Ed. 2d 102 (1975) 19

Eaton v. City of Tulsa, 415 U.S. 697 (1974) 16

Gibson v. Florida Legislative Investigative Committee, 372 U.S. 539 (1963) 18

In re Sawyer, 360 U.S. 622 (1959) 16

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 7, 13, 16, 17

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 17

Pennekamp v. Florida, 328 U.S. 331 (1946) 16
Powell v. Alabama, 287 U.S. 45 (1932) 18
Procunier v. Martinez, 416 U.S. 296 (1974) 18

PAGE

Shelton v. Tucker, 364 U.S. 479 (1960) 18
Southeast Promotions Ltd. v. Conrad, —— U.S. ——, 43 L.Ed.2d 448 (1975) 17

United Mineworkers v. Illinois State Bar Association, 389 U.S. 217 (1967) 16
United States v. Allegheny-Ludlum Industries, Inc., 5th Cir. No. 74-3056 6
United Transportation Union v. State Bar, 401 U.S. 576 (1971) 16

Wood v. Georgia, 370 U.S. 375 (1962) 16

Statutes and Rules:

42 U.S.C. § 1981 3

42 U.S.C. § 2000e-5(k) 4

Civil Rights Act of 1964, Title VII 3, 12, 14, 15

Federal Rules of Civil Procedure, Rule 23 ..... 2, 10, 12, 13, 14

Local Rule 19B, S.D. Florida 20

Local Civil Rule 22, N.D. Illinois 20

Local Rule 20, D. Maryland 20

Local Rule 34, W.D. Pa. 2, 11

Local Rule 34(d), W.D. Pennsylvania 4, 10, 11, 12, 15, 20, 21

Local Rule 6, S.D. Texas 20

Local Rule C.R. 23(g), W.D. Washington 20

Other Authority:

Manual for Complex Litigation, 1 Moore, Federal Practice, ¶ 1.41 (3d Ed. 1974, part 2) 11, 20, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1483

UNITED STATES STEEL CORPORATION,

Petitioner,

v.

JIMMIE L. RODGERS and JOHN A. TURNER.

BRIEF IN OPPOSITION TO CERTIORARI

Opinion Below

The opinion of the Court of Appeals for the Third Circuit dated January 24, 1975, is reported at 508 F.2d 152.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether the court of appeals was correct in issuing a writ of mandamus and/or prohibition in an employment discrimination case to strike down a local rule and district court orders which for three years prevented civil rights lawyers from talking with black steelworkers who were potential class members and prohibited the lawyers from meeting with an NAACP branch which included potential

class members, where the district court had not even determined if the case could proceed as a class action, either

1. On the ground that such restraints on free speech were not authorized by statute and imposed unreasonable conditions upon the availability of class actions which were inconsistent with Rule 23, Federal Rules of Civil Procedure and with Title VII of the Civil Rights Act of 1964; or

2. Upon the ground that the local rule and orders of court violated the First Amendment rights of plaintiffs and their potential class members and lawyers to freedom of speech, freedom of association, and privacy of association, and also violated their rights to freedom from discriminatory or censorial regulations of their speech and associations, as well as violating the right to counsel.

Statutes and Rules Involved

The case involves Local Rule 34 of the United States District Court for the Western District of Pennsylvania, which provides in part:

> Rule 34. Class Actions.
>
> In any case sought to be maintained as a class action.
>
> * * *
>
> (c) Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, Federal Rules of Civil Procedure, as to whether the case is to be maintained as a class action. In ruling upon such a motion, the Court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postpone-

ment of the determination pending discovery of such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination should be postponed, a date will be fixed by the Court for renewal of the motion before the same judge.

(d) No communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an order may be entered by the Court approving the communication.

Statement

Respondents Rodgers and Turner are black steelworkers employed at United States Steel Corporation's Homestead Works. They brought this employment discrimination case in the United States District Court for the Western District of Pennsylvania in August 1971, against the steel company and the local and national unions representing workers at the plant. The complaint alleges a pervasive pattern of racial discrimination by the defendants in violation of Title VII of the Civil Rights Act of 1964 and of 42 U.S.C. § 1981, and requests injunctive relief and back pay for the named plaintiffs and a class of more than 1,200 black workers employed at Homestead Works. As the opinion below explains, notwithstanding the fact that early in the case the parties stipulated the definition of the class involved, the district court has not yet ruled on plaintiffs' repeated motions that the case be certified as a class action. 508 F.2d at 155.

This petition involves a collateral issue not dealing with the merits of plaintiffs' job discrimination claim which has

not yet been tried or decided. This phase of the case deals with the fact that the district court by rule and orders prevented plaintiffs' lawyers from talking with any of the black workers at Homestead Works for three and a half years until the court of appeals issued its writ of mandamus and/or prohibition.

Plaintiffs' local attorney is Bernard D. Marcus of the Pittsburgh firm of Kaufman & Harris. He has associated with him in the case several lawyers employed by the N.A.A.C.P. Legal Defense and Educational Fund, Inc., a non-profit corporation which has furnished legal aid in civil rights cases in state and federal courts for thirty-five years. The Fund is a New York corporation, approved to function as a legal aid organization. Neither Mr. Marcus nor the Legal Defense Fund lawyers have accepted or expect any compensation from the plaintiffs, or from any member of the potential class. Mr. Marcus and his firm will be compensated only in the event attorneys fees may eventually be taxed against the defendants by the court as authorized by Title VII, 42 U.S.C. § 2000e-5(k). Any fee which might be awarded by the court on account of work done by Legal Defense Fund employees will be paid to that non-profit corporation and not to the individual salaried staff attorneys.

For over three years from the filing of the suit until the decision of the court of appeals, plaintiffs' attorneys were forbidden from communicating with class members by Local Rule 34(d) and several orders issued to enforce that rule.

Plaintiffs' attorneys first sought permission to talk with class members by motion filed September 21, 1973. The motion alleged that plaintiffs' ability "effectively to present the claims of class members, to discover the case, and to define the scope of the issues with greater specificity de-

pends in significant part on their having access to class members, to investigate their complaints, and to supplement the available defendants' documentary materials by interviewing their employees." Plaintiffs asked for a general order "allowing proper communications" and stated that "It would be impractical and unworkable for plaintiffs to reapply specifically for permission to communicate with particular class members."

At a hearing on September 29, 1973, the court denied the motion:

> THE COURT: The ruling of the Court is that they can't contact people who are not named as parties until an order of Court. No person is to be contacted without my permission. As to the specific individual concerned after giving notice to the defendants who the individual is and what you expect to learn from him, then we can determine whether this is sufficient reason to change the general rule.
>
> The transcript of this conference will take the place of and will be considered the order of this Court, no written order being necessary by agreement of all parties. (App. 85a-86a)

Plaintiffs made a further effort to get permission to talk with potential class members in June 1974. In the background of this second effort was a related development which had occurred in the Northern District of Alabama, where on April 12, 1974, the court had approved two consent decrees in a suit by the United States against nine major steel companies, including United States Steel, and the United Steelworkers of America, AFL-CIO. The consent decrees, approved on the same day the Alabama suit was filed, purported to be a nationwide settlement of all race and sex discrimination claims in the steel industry,

including claims at Homestead Works.[1] The consent decrees changed seniority practices at steel plants such as Homestead Works, and provided a back pay remedy for certain black employees. The consent decrees provide for communication to black class members by the defendants and the solicitation of waivers of Title VII claims in order for them to receive back pay.

Plaintiffs in the *Rodgers* case, who had been prevented from communicating with class members since suit was filed in 1971, again moved in April 1974 for a class certification and proposed that the court sign a notice to class members explaining the status of the case. Plaintiffs moved for an order prohibiting the defendants from soliciting releases from class members, but withdrew this motion when defendants agreed at the hearing to show plaintiffs' counsel written communications in advance and afford plaintiffs time to apply for a protective order if counsel objected to any communication.

On June 26, 1974, plaintiffs moved for permission for their counsel to talk with six named class members and to attend a meeting of the Homestead Branch of the NAACP. The moving papers explained that two of the six workers had sought information and assistance about employment discrimination from the Assistant Labor Secretary of the NAACP in New York, and had been referred by her to the Legal Defense Fund attorneys. The Homestead Branch of the NAACP had independently invited the plaintiffs' attorneys to come to a branch meeting to discuss discrim-

[1] The legality of the consent decrees was promptly challenged by black workers from various states (including Rodgers and Turner) who intervened in the Alabama case. The case is now pending in the Fifth Circuit on the appeal of those intervenors from an order rejecting all challenges to the consent decrees. *United States* v. *Allegheny-Ludlum Industries*, 5th Cir. No. 74-3056.

ination at Homestead Works. The motion pointed out the nature and purposes of the NAACP and explained the circumstances of the invitation which included a request for information about the Alabama consent decrees and the pending local litigation. The motion alleged specifically that a denial of the right to communicate would violate constitutionally protected rights of free speech and association as well as the right of counsel to practice law. The motion relied on *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963), and a series of succeeding cases.

On the same date, June 26, plaintiffs filed a related motion entitled "Renewed Motion for Permission to Communicate with Members of the Proposed Class" (App. 166a-170a). The latter motion pointed out that the court had set January 15, 1975, as the deadline for completion of discovery; that under the prior orders of court counsel were unable to communicate with class members for discovery purposes, that plaintiffs had undertaken a great deal of time-consuming and costly computer analysis and discovery of defendants' records and now needed to talk with members of the class in order to effectively present their claims, to define the issues and complete discovery, and that it was impractical and unworkable for plaintiffs to apply specifically for the right to communicate with particular class members. The motion alleged also that it was inequitable to prohibit communication by plaintiffs while the defendants could communicate with the class pursuant to the consent decrees to offer them back pay and seek to persuade employees to execute releases waiving their rights.

At a hearing on the motion on June 27, 1974, the court orally forbade plaintiffs' attorney from attending an NAACP meeting scheduled for July 7, and reserved decision pending briefs on the constitutional issues. The court

also stayed all discovery and a class determination until January 15, 1975. Plaintiffs then moved for entry of a written order embodying these rulings and for a certification to permit an interlocutory appeal. On July 19, 1974, the court orally denied the certification and the motion to communicate with the NAACP. The court granted the motion to talk with the six workers, but when U. S. Steel's attorney pointed out that only two of the six had contacted the New York office of the NAACP, the court ruled that counsel could speak with them or any other class members only if they first filed in court the class members' affidavit stating how they happened to consult counsel. The court's oral ruling is quoted in the opinion below, 508 F.2d at 157-158.

Judge Teitelbaum made it clear that the prior restraint was not merely to prevent solicitation and "barratry." When Mr. Marcus asked the court if he and his colleagues could attend the NAACP meeting if they would agree not to represent any of the workers there, except in the pending class action, the court "made clear that its purpose in continuing the ban on communication was to prevent discussion of the Alabama consent decree" (508 F.2d at 158). The purpose of the restriction on communication was to prevent what Judge Teitelbaum called "sabotage" of the Alabama consent decree (508 F.2d at 152). Although plaintiffs requested written orders, none were filed.

Plaintiffs filed an appeal and a petition for a writ of prohibition or mandamus with respect to those orders, and also sought a stay pending the decision of the court of appeals on the merits. When the stay was denied without prejudice for lack of a district court order giving reasons for its action, plaintiffs again applied to the district court for a written order—which was finally forthcoming on

September 12, 1974, embodying the June 27 and July 19, 1974, oral rulings.

On January 24, 1975, the court of appeals issued a writ of mandamus or prohibition with respect to the orders restricting communications. In its opinion the court of appeals observed that the district court had superimposed a condition on the availability of the class action device that raises serious First Amendment issues:

> . . . The two provisions make clear that the District Court for the Western District of Pennsylvania has superimposed upon Rule 23 a condition that the class action device be available only to those plaintiffs willing to submit to an assertion of a dual power by the court—the power to postpone class action determination and to impose a prior restraint in the meantime. That the prior restraint may be of extended duration is clear; in this case it has continued for more than three years.
>
> The imposition of such a condition upon access to the Rule 23 procedural device certainly raises serious first amendment issues. . . . There is no question but that important speech and associational rights are involved in this effort by the NAACP Legal Defense and Education Fund, Inc. to communicate with potential black class members on whose behalf they seek to litigate issues of racial discrimination. See, e.g., *United Transportation Union* v. *State Bar*, 401 U.S. 576 (1971); *NAACP* v. *Button*, 371 U.S. 415 (1963). And the interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment. See *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941).

> Whatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world. See T. Emerson, *The System of Freedom of Expression*, 449, *et seq.* (1970). (508 F.2d at 162-163).

However, the court of appeals found it unnecessary to rest its decision on First Amendment grounds, because it concluded that the district court had no statutory authority to promulgate Local Rule 34(d) which it found to be inconsistent with the policy underlying Rule 23 of the Federal Rules of Civil Procedure. The Third Circuit noted that the district court was seeking to prevent "barratry"; that the policy of Rule 23 was "in favor of having litigation in which common interests or common questions of law or fact prevail, disposed of where feasible in a single lawsuit"; that there was no federal common law offense of barratry; and that even if the federal rules and statutes were construed to authorize the adoption of local rules for controlling barratry, a serious "constitutional issue of overbreadth would be presented by the Local Rule in its present form." (508 F.2d 163-164). The court went on to state:

> The rule imposes a prior restraint on all communication, not merely communication aimed at stirring up litigation. Think what our reaction would be to a state statute which required that attorneys submit all communicatons to be made to persons not yet their clients to the prior approval of a court. (508 F.2d at 164)

The court then concluded that Local Rule 34(d) was outside the rule-making power granted to the district court. The majority found it unnecessary to decide

whether a local rule regulating communications "after a class determination has been made," would be valid but pointed out that drafting such a rule would require "careful consideration of overbreadth." 508 F.2d at 164.

The court noted that Local Rule 34(d) was adopted in response to a suggestion in the *Manual for Complex Litigation*, see 1 Moore, Federal Practice ¶ 1.41, at 27-32 (2d Ed. 1974, part 2). The court below noted that Local Rule 34(d) contains none of the exceptions recommended in the *Manual*. In any event, the court of appeals made it plain that it had no occasion to rule on whether the suggested Local Rule 7 in the *Manual* contained sufficiently specific exceptions to avoid the overbreadth problem. 508 F.2d at 164-165, note 18.

Judge Weis filed a concurring opinion which agreed that Local Rule 34 should be set aside "not, however, because of the time period in the litigation, but, rather because it is overbroad in its wording." Thus Judge Weis did reach the constitutional question and decide it in plaintiffs' favor saying: "Accordingly, it seems to me that local Rule 34, as it applies to civil rights actions, must be set aside as being unnecessarily broad." 508 F.2d at 166.

The court of appeals, and this Court, denied motions by U. S. Steel for a stay pending certiorari. —— U.S. ——, 43L.ed.2d 649. After the district court vacated its prior orders, plaintiffs' attorneys finally met with the Homestead Branch of the NAACP and discussed racial discrimination problems at Homestead Works with black steelworkers.

Argument

This case does not warrant review on certiorari because the decision of the court of appeals is in accord with this Court's prior decisions, and there is no conflict among the circuits on the questions presented. The decision of the Third Circuit, which set aside the trial court's across-the-board prior restraint of all communications between plaintiffs' attorneys and the potential class of black steelworkers, is entirely supportable on a number of grounds. The result is plainly correct because the district court's rule and orders were inconsistent with Rule 23 of the Federal Rules of Civil Procedure, with Title VII of the Civil Rights Act of 1964, with the First Amendment's guarantee of freedom of speech and association, and with the right to counsel. In the factual context of the case the district court's rulings were discriminatory, censorial and inequitable in the treatment of plaintiffs vis-a-vis the defendants.

1. The local civil rule and orders of the district court were in conflict with Rule 23 of the Federal Rules of Civil Procedure.

The court below properly concluded that Local Rule 34(d) and the orders implementing that rule in this case, which were ostensibly designed to supplement Rule 23 of the Federal Rules of Civil Procedure, were actually inconsistent with the policy underlying Rule 23. As the court below analyzed the case, the district judge had asserted a "dual power . . . to postpone class action determination [for an extended period] and to impose a prior restraint in the meantime." 508 F.2d at 162. Local Rule 34(d), as Judge Gibbons observed, "imposes a prior restraint on all communication, not merely communication

aimed at stirring up litigation." 508 F.2d at 164. The Third Circuit acknowledged that district courts had some powers to regulate communications and referred to "the undoubted power to impose some restrictions on first amendment rights during the course of judicial proceedings." 508 F.2d at 162. But the court found no authorization in the statutes or rules for a trial court to condition the availability of the Rule 23 class action device upon a litigant's submission to an indefinite period of prior restraint on all communications about the case.

The court noted the injustice of imposing a restraint on speech in order to prevent abuse of the class action device, where the court indefinitely delayed a decision about whether the class action procedure could be employed in any event. It was in this context that the court made a distinction between the role of a court in imposing restraints before and after class certification. If class representative status was eventually denied the years of imposed restraint on free speech would have been imposed for naught. The court of appeals found it improper to delay class certification while imposing a broad gag rule as a condition to seeking representative status.

The court of appeals also noted that while the prevention of "barratry" and "solicitation" (cf. *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963)) was one proffered justification for the trial court's rulings, the ban was in no way limited to communications which might fit within those general rubrics. Plaintiffs' attorneys were forbidden to interview workers while investigating the case and gathering witnesses and evidence unless they first obtained the court's permission for each interview by making a showing of what they expected to learn from each worker. Plaintiffs' attorneys, some of whom were employed by a civil rights

organization, were forbidden from attending a meeting of the Homestead Branch of the NAACP because some potential class members would attend the meeting. The prohibition against attending the NAACP meeting forbade mere presence at the meeting. Plaintiffs' counsel would have been in violation of this order if they had attended the meeting without speaking at all, if they attended and spoke only of unrelated subjects, if they spoke about the case only in the most restrained and proper manner, if they distributed copies of relevant court papers or orders, or if they merely gave an abstract explanation of Title VII of the Civil Rights Act of 1964. The court of appeals was entirely correct in finding no authority to impose such restraints on free speech and association conferred by the general grant of authority to make rules of practice "not inconsistent with" the Federal Rules of Civil Procedure.

In any event, the Third Circuit concluded that the orders and rule of the district court were inconsistent with the policy of Rule 23 of the Federal Rules of Civil Procedure which is "in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit." 508 F.2d at 163. The court perceived the district court's ruling as preventing the full implementation of the policy of Rule 23. That conclusion is entirely reasonable because lawyers subject to the district court's restraints are quite evidently hobbled in carrying out the obligation to fairly and adequately represent the class. A lawyer conscientiously engaged in representing a large class of workers would want to learn their grievances and concerns by personal interviews, and would want to respond to inquiries by class members. The duty of fair representation probably encompasses some obligation of responsiveness to concerns of class members who are not named plaintiffs.

It certainly encompasses an obligation to fully investigate the facts of racial discrimination suffered by the class in order to adequately litigate the merits of the case. It is fair to conclude that the restraints imposed by the district court on plaintiffs in this case so hamstrung their presentation of the case as to conflict with the policy of Rule 23 supporting class actions.

2. The district court's rulings conflicted with Title VII of the Civil Rights Act of 1964.

The arguments that the district court exceeded its authority by rulings conflicting with the principles of Rule 23 have added force in the context of a fair employment suit brought under Title VII of the Civil Rights Act of 1964. As this Court held in *Albermarle Paper Co.* v. *Moody*, —— U.S. —— (decided June 25, 1975), Congress intended that Title VII plaintiffs have the benefit of the class action device, for backpay claims as well as for injunctive relief. Title VII suits are encouraged by statutory provisions for the award of counsel fees to successful plaintiffs who vindicate the public interest in eliminating discrimination. *Albermarle Paper Co., supra.* The rules and orders of the district court restraining communications were all the more inappropriate in a case such as this where plaintiffs' attorneys were charging the class members no fees, offered to agree not to represent any more clients among the class members, and were entirely dependent upon the court itself to determine any fee they might obtain if they eventually won the case on the merits.

3. Local Civil Rule 34(d) violates the First Amendment.

The trial court imposed unconstitutional prior restraints on free speech and association in violation of the First Amendment. The decision of the court of appeals, while

not resting on constitutional grounds, recognize "the important speech and associational rights . . . involved in this effort by the NAACP Legal Defense and Educational Fund, Inc. to communicate with potential black class members on whose behalf they seek to litigate issues of racial discrimination." 508 F.2d at 163. And the Third Circuit cited this Court's decisions in *United Transportation Union* v. *State Bar*, 401 U.S. 576 (1971), and *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963), recognizing the free speech and association rights involved in such litigation efforts. See also, *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. State Bar*, 377 U.S. 1 (1964), and *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217 (1967).

This Court's decisions also make it clear that plaintiffs' counsel are not stripped of all First Amendment rights simply because they are attorneys before the bar of the court. *Brotherhood of Railroad Trainmen, supra*, 377 U.S. 1, 8. And as the court below put it, "the interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment." 508 F.2d at 163. An unbroken line of cases from *Bridges* v. *California*, 314 U.S. 252, 268 (1941), and including *Craig* v. *Harney*, 331 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *In re Sawyer*, 360 U.S. 622 (1959); and *Wood* v. *Georgia*, 370 U.S. 375, 384, 393 (1962), dispels any notion that lawyers are without free speech rights to talk about pending cases. To justify punishment (let alone prior restraint), there must be "an imminent, not merely a likely, threat to the administration of justice." *Craig* v. *Harney*, 331 U.S. 367, 376; *cf. Eaton* v. *City of Tulsa*, 415 U.S. 697, 698 (1974).

Of course, on the facts of this case, there is no question about any allegedly improper or punishable conduct by

plaintiffs' counsel. They have obeyed the district court's prohibition against communication and there is not the slightest suggestion in the record that they engaged in any solicitation or communication in violation of the court rules and orders. Thus, the case does involve the power of a court to punish disobedience of its orders or allegedly improper speech or conduct. Rather, the case involves the validity of a broad prior restraint. This Court has set forth, now well established principles disfavoring prior restraints in the area of First Amendment freedoms. *Southeast Promotions Ltd.* v. *Conrad*, —— U.S. ——, 43 L.Ed.2d 448, 459-460 (1975); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Carroll* v. *Princess Ann County*, 393 U.S. 175, 181 (1968); *Bantam Books* v. *Sullivan*, 372 U.S. 58, 70 (1963).

The prior restraint system set up by the trial court is fatally overbroad in its sweeping restraint on entirely lawful communications. It has become axiomatic that "precision of regulation must the touchstone in an area so closely touching our most precious freedoms," *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438 (1963). By establishing a prior restraint sweeping far beyond any legitimate concern of the court in regulating the conduct of class actions, the district court's rule and orders limited First Amendment freedoms in a fashion far more sweeping than could be justified by any governmental interest involved. *N.A.A.C.P.* v. *Button, supra.*

4. The trial court's rules and orders interfered with free access to counsel.

Freedom of association includes a right to privacy of association. The district court's requirements that every contact between plaintiffs' counsel and members of the class be disclosed prevents class members from consulting

with or assisting plaintiffs' lawyers in private and makes their every contact known to their employers. These rules invade the traditional attorney-client privacy. Little imagination is required to perceive that many a potential client or informant would be loath to approach counsel by running the gauntlet imposed by the trial court's orders. "Freedom [of speech, press and association] are protected not only against heavy handed frontal attack, but also from being stifled by more subtle governmental interference," *Bates* v. *Little Rock*, 361 U.S. 516, 523 (1960); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Gibson* v. *Florida Legislative Investigative Committee*, 372 U.S. 539 (1963).

When black steelworkers seek to consult plaintiffs' attorneys they seek to exercise "the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 7 (1964). As the Court said in that case, "laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counselled adversaries, . . ." (*ibid.*). Indeed, the right to be heard by counsel of one's own choice has been called "unqualified." *Chandler* v. *Fretag*, 348 U.S. 3, 9 (1954). See also, *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932), where the Court said that an arbitrary refusal to hear a party by counsel would be a denial of due process "in any case, civil or criminal." And see, *Procunier* v. *Martinez*, 416 U.S. 296 (1974), condemning unjustified restrictions on prisoners' access to legal assistants and law students employed by counsel.

5. The restraint on communications was censorial and discriminatory.

The district court's restraint on communications was one-sided and unfair in its impact upon the efforts of black workers to oppose the defendant company and union. Defense counsel were entirely free to consult with their clients in respect to any matters relevant to the conduct of the lawsuit. The company and union have virtually limitless opportunity to communicate with black steelworkers in the regular course of business, and in the conduct of union affairs. Beyond that, the defendants had judicial sanction to explain the meaning of the consent decrees, and at a later date to offer back pay and solicit the workers release of their Title VII claims. "Implementation Committees" composed of company and union representatives met with workers to explain the Alabama consent decree.

In this context, the district court entered orders with the avowed purpose to prevent plaintiffs' attorneys from discussing the consent decrees with class members—even those who invited them to come to a civil rights organization meeting for this purpose. 508 F.2d at 158. This censorship of plaintiffs' speech unfairly disadvantaged those workers who sought to oppose the consent decrees, and gave an undue advantage to the defendants who sought to defend that decree and interpose it as a defense to the *Rodgers* suit. (For a similar case where U. S. Steel has sought to use the consent decrees to defeat a previously filed Title VII suit, see *Dickerson* v. *United States Steel Co.*, 64 F.R.D. 351, 360 (E.D. Pa. 1974), appeal quashed 9 E.P.D. 10063 (3d Cir. 1975), *cert. denied*, —— U.S. ——, 44 L.Ed.2d 102 (1975).) The district court's rulings constituted an invidious discrimination which allowed the defendants to voice their views with the workers by meet-

ings and by written communications while the plaintiffs were totally restrained from speaking.

6. The court of appeals carefully delimited its ruling to avoid broad issues involving other types of regulations which might be imposed in other cases or by other rules of court.

There is no conflict of circuits on the questions presented here because no other court of appeals has decided similar issues. Indeed, insofar as our research has discovered, no court has adopted a local rule as broad and sweeping as Local Rule 34(d). Our research has located only five other federal districts which have any rule regulating communication in class actions.[2] It is quite clear that Local Rule 34(d) is uniquely restrictive even among the small number of related federal court rules. Four of the rules partially codified Suggested Local Rule No. 7 in the *Manual for Complex Litigation*, 1 Moore Fedral Practice (par. 72, 1973). These rules specifically enumerate kinds of communication the rule is supposed to cover and contain exceptions not present in Rule 34(d).

Petitioners have attempted to defend Local Rule 34(d) by citation of the *Manual*. Actually the *Manual* quite explicitly disavows any such permanent or absolute prohibition of contact with class members, *Manual* § 1.41:

> The recommended preventive action, whether by local rule or order, is not intended to be either a permanent or an absolute prohibition of contact with actual or potential class members. Promptly after the entry of the recommended order, or the applicable date of the local rule in a case, and at all times there-

[2] Local Rule 19B, S.D. Florida; Local Civil Rule 22, N.D. Illinois; Local Rule 6, S.D. Texas; Local Rule C.R. 23(g) W.D. Washington; Local Rule 20, D. Maryland.

> after, the court should, upon request, schedule a hearing at which time application for relaxation of the order and proposed communications with class members may be presented to the court. Since the recommended rule and order are designed to prevent only potential abuse of the class action and are not meant to thwart normal and ethically proper processing of a case, the court should freely consider proposed communications which will not constitute abuse of the class action. In many such cases, the class members will have knowledge of facts relevant to the litigation and to require a party to develop the case without contact with such witnesses may well constitute a denial of due process.
>
> There will normally be some need for counsel to communicate with class members on such routine matters as answering factual inquiries and developing factual matters in preparation for the class action determination as well as for trial. In order that there might be some minimal judicial control of these communications, it is suggested that *ex parte* leave may be given by the court. If requesting counsel is at a distance from the court, the request may be handled by telephone.

No such cautionary note is present in Local Rule 34(d). This fact is underlined by the district court rulings that have exactly the unintended effect on the normal processing of this case.

The opinion below carefully refrained from ruling on the constitutional validity of suggested model provisions such as those in the Manual. 508 F.2d at 164-165.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

Jack Greenberg
James M. Nabrit, III
Morris J. Baller
Barry L. Goldstein
Deborah M. Greenberg
Eric Schnapper
Bill Lann Lee
10 Columbus Circle
New York, N. Y. 10019

Bernard D. Marcus
Kaufman & Harris
415 Oliver Building
Pittsburgh, Pa. 15222

Attorneys for Respondents